Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding.[1/] NCTA is the principal trade association of the cable television industry. In addition to providing video programming services to more than 60 million households nationwide, NCTA's members are aggressively pursuing entry into the competitive local telephony marketplace through numerous State certification proceedings.[2/]

INTRODUCTION AND SUMMARY

In the interests of ensuring fair competition in the video and local telecommunications markets, NCTA makes two proposals in response to the Notice. First, effective structural

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[1/] Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996).

[2/] See Comments of The National Cable Television Association, Inc. in CC Docket No. 96-98 (May 16, 1996), at 1 n.1.

safeguards, particularly limitations on inbound and outbound telemarketing, are necessary to prevent the Bell operating companies ("BOCs") from using their dominant position in local telephone service to undermine competition in the video marketplace. The Commission has the authority to impose such limitations under its general authority to ensure that the BOCs' offering of incidental interLATA services, which include the provision of audio and video programming to subscribers, does not adversely affect telephone ratepayers or competition.

Second, in light of recent announcements by several BOCs, the Commission should declare that a BOC's provision of both local exchange and in-region interLATA services through the same affiliate would violate the structural separation between local exchange and in-region interLATA services required by the Telecommunications Act of 1996. The creation of such affiliates is unnecessary to enable the BOCs to jointly market local and interLATA services, and could undermine the competitive objectives of the Act.

I. THE COMMISSION CAN AND SHOULD IMPOSE LIMITATIONS ON THE MARKETING OF VIDEO SERVICES BY THE BOCS IN THEIR TELEPHONE SERVICE AREAS

Under section 271(h) of the Communications Act of 1934, as amended, the Commission must ensure that the provision of the incidental interLATA services authorized in subsection (g) by a BOC or its affiliate does not "adversely affect telephone exchange ratepayers or competition in any telecommunications market."[3/] The provision by a BOC of video programming to subscribers is an incidental interLATA service.[4/]

[3/] 47 U.S.C. § 271(h).

[4/] 47 U.S.C. § 271(g)(1)(A).

While subsection (g) resolves altogether the question of whether the BOCs should be permitted to offer the incidental interLATA services delineated therein, the authority granted to the Commission in Section 271(h) ensures that the Congressional supersession of the Modification of Final Judgment ("MFJ") does not prevent the adoption of measures designed to safeguard competition in the markets affected by the removal of the restriction on BOC provision of those services. Indeed, the Conference Committee modified the Senate-passed version of section 271(h) to empower the Commission to safeguard competition in the markets affected by the removal of the incidental interLATA services restriction.[5/]

The exemption of incidental interLATA services from the separate affiliate requirements set forth in section 272 does not affect the Commission's authority to impose competitive safeguards under section 271(h).[6/] Section 272(a)(2)(B)(i) states only that the full panoply of separate affiliate and safeguard requirements mandated by section 272 need not be imposed in

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[5/] See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 152 ("Conference Report") (noting that Section 272 is based upon the Senate bill with modifications). Compare S. 652, 104th Cong. 1st Sess. § 255(e)(2) (1995) ("The provision of services authorized under this subsection by a Bell operating company or its affiliate shall not adversely affect telephone exchange ratepayers or competition in any telecommunications market") with 47 U.S.C. § 271(h) ("The Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange ratepayers or competition in any telecommunications market") (emphasis added).

While the provision of video programming services to subscribers is not a telecommunications service, section 271(h) references "telecommunications markets." That term is not defined in the Act, but it is reasonable to construe it as referencing all markets affected by the removal of the restriction on incidental services, which includes the offering of video programming.

[6/] See Notice at ¶ 37.

connection with the BOCs provision of incidental interLATA services.[7] That provision does not preclude the Commission from imposing a safeguard encompassed within section 272 pursuant to an alternative, independent source of statutory authority.[8] Indeed, to construe the statute otherwise would vitiate the authority granted to the Commission in section 271(h).[9]

Because of the dangers of discrimination inherent in the joint marketing of monopoly telephone services and unregulated video services in a BOC's local telephone service areas, the Commission should exercise its authority under section 271(h) to prohibit such activities by a BOC unless certain safeguards related to inbound and outbound telemarketing are in place. The Commission has long recognized that the potential for anticompetitive abuse inherent in joint marketing efforts by the dominant provider of basic telephone services. In its Sales Agency Order,[10] the Commission allowed the Bell operating companies to refer customers to their affiliated equipment sales organizations, provided that the contact person informed customers that the equipment or services could also be obtained from other vendors.[11] The Commission found that only with such safeguards would marketing arrangements enhance competition and increase consumer convenience. Otherwise, the telephone companies' marketing operations

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[7] 47 U.S.C. § 272(a)(2)(B)(i).

[8] See 47 U.S.C. § 272(f)(3) (noting that separate affiliate/safeguard sunset provisions do not "limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience and necessity").

[9] Statutes must be construed to give all of their terms operative effect. See United States v. Nordic Village Inc., 503 U.S. 30 (1992); United States v. Menasche, 348 U.S. 528 (1955).

[10] In the Matter of American Telephone and Telegraph Co., 98 FCC 2d 943 (1984) ("Sales Agency Order").

[11] Id.

would be the source of "an important competitive advantage," creating the opportunity for abuses.[12/]

Similarly, a BOC could use its long-standing relationships with basic telephone subscribers to discriminate against unaffiliated cable operators and other providers of video programming and gain an insuperable market advantage over its video competitors. Telephone companies will often be the recipient of the first commercial communication from a person moving into an area, when that person seeks to initiate basic telephone service.[13/] Absent reasonable limitations on inbound telemarketing, a BOC could use that contact to sell them video services before unaffiliated vendors have the opportunity to contact the customers through outbound telemarketing or direct mail.

Specifically, a BOC should be permitted to conduct any inbound telemarketing[14/] or referrals of its video services only on the condition that it provides the same marketing on the same terms, conditions, and prices to all cable operators and other providers of video programming in the same area. The Commission should limit the inbound telemarketing or referral services provided by the BOC to a listing, on a rotating basis, of video programmers and cable operators, including the BOC's programming affiliate, that request such a listing service. To prevent the BOC operator from using its inbound telemarketing in a manner that

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[12/] Id. at 1142 (noting that "[m]ixing the marketing [of regulated and unregulated] products creates the potential for . . . the monopoly network provider's use of monopoly-derived revenues and its monopoly position to gain unfair leverage in unregulated markets.").

[13/] According to the Census Bureau, about ten percent of all Americans move during the course of a single year.

[14/] "Inbound telemarketing" refers to telemarketing or referrals that occur during a call initiated by a customer or a potential customer of the service.

disadvantages a video programmer or cable operator, the BOC should not be permitted to include any information about the price, terms, or conditions of service offered by any video programmer or cable operator, and should be prohibited from engaging in comparisons among video programmers and cable operators.[15/]

To avoid the possibility that a BOC would use its monopoly-derived customer lists to gain an unfair advantage in the outbound telemarketing of unregulated services, moreover, the Commission should bar such telemarketing at least until the BOC can show that a competing multichannel video programming distributor is engaged in the outbound joint marketing of local telephony and video services.[16/]

The limitations on telemarketing proposed above can be implemented without imposing the type of full-fledged separate affiliate contemplated by section 272. For example, in both the judicial order authorizing the BOCs to offer interexchange cellular services and the AT&T/McCaw consent decree, marketing restrictions designed to safeguard competition were imposed on a single entity without the need to require the creation of separate affiliates.[17/]

[15/] These rules are analogous to the Commission's rules governing the joint marketing of local telephone service and customer premises equipment by LECs. See Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 4 FCC Rcd 6537 (1989). In this regard, it is worth noting that the Commission retains this pre-1996 authority to impose limitations on inbound telemarketing on all incumbent local exchange carriers. See 47 U.S.C. § 272(e)(3).

[16/] The Commission can and should impose a similar condition on all incumbent LECs. Cf. note 15, supra.

[17/] See United States v. Western Electric, Civ. Action No. 82-0192, slip op. and order (D.D.C. April 28, 1995) ("Generic Wireless Relief Order") at 19-20 (requiring a BOC wireless affiliate "to offer separately and market separately [its] local and long distance cellular service"); see id. Order at § 4(g) (requiring distinct "wireless exchange sales force" and "long distance sales force"). United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civ.

II. THE COMMISSION SHOULD ENSURE THAT THE BOCS DO NOT CIRCUMVENT THE ACT'S REQUIREMENTS THROUGH THE ESTABLISHMENT OF AFFILIATES PROVIDING BOTH LOCAL EXCHANGE AND IN-REGION INTERLATA SERVICES

Section 271 of the Communications Act permits a BOC to provide in-region interLATA services only if the Commission determines that the requesting BOC has implemented the competitive checklist and complied with the separate affiliate and safeguard requirements of section 272.[18/] The Commission must also find that such entry would be consistent with the public interest.[19/] Congress intended that the prospect of providing in-region interLATA service would function as an incentive to encourage the BOCs to open their local exchange monopolies to facilities-based competitors in accordance with the competitive checklist embodied in section 271.[20/] Congress also determined that during the transition to local competitive markets, the BOCs core local exchange business should be kept structurally separate from the

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Action No. 94-0155, Proposed Final Judgment (D.D.C. July 15, 1994), at Section V(A)(4) (requiring that AT&T's equipment manufacturing group create separate marketing account teams for McCaw and other AT&T affiliates providing telecommunications services, on one hand, and unaffiliated telecommunications services providers).

[18/] 47 U.S.C. § 271(d)(1)-(2).

[19/] 47 U.S.C. § 271(d)(3).

[20/] See e.g., 141 Cong. Rec. S8139 (daily ed. June 12, 1995) (statement of Sen. Kerrey) ("The way to overcome this ability to of the RBOCs to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition"); 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert) ("Fair competition means local telephone companies will not be able to provide long-distance service in the region where they have held a monopoly until several conditions have been met to break that monopoly").

new businesses that it seeks to enter and should be subject to certain nondiscriminatory requirements to ensure competitive fairness.[21/]

Already, however, the BOCs are taking steps that, if permitted, would circumvent these fundamental requirements. In California, for example, a Pacific Bell affiliate, Pacific Bell Communications Inc. ("PBCom"), has sought authority to provide both local exchange service and in-region interLATA services.[22/] Likewise, Ameritech Communications Inc. ("ACI") is seeking to create a separate affiliate that also would provide within a single entity both local service and in-region interLATA services.[23/]

The BOCs have suggested that the creation of such units is necessary to enable them to bundle local and long distance service.[24/] This argument does not bear scrutiny, however. The 1996 Act clearly permits the BOCs to jointly market local and long distance service once they meet the conditions established in section 271 for the provision of in-region interLATA services.[25/] Those conditions include the establishment of a structural separation between local

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[21/] Notice at ¶ 3 (noting that Section 272 safeguards "are intended both to protect subscribers to BOC monopoly services . . . and to protect competition . . . in markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets thee BOCs seek to enter").

[22/] See Application of Pacific Bell Communications For A Certificate of Public Convenience and Necessity to Provide InterLATA, IntraLATA and Local Exchange Telecommunications Services, App. No. 93-03-007 (Mar. 5, 1996).

[23/] See "Bells Sidestep Local Service Regulations," Wall St. Journal, July 15, 1996, A3; "Bells Seeks to Create Unregulated Units; Plan Would Allow Affiliates to 'Bundle' Phone Services in Parent's Area," Washington Post, July 16, 1996, C2.

[24/] See id.

[25/] 47 U.S.C. § 272(g)(2). See also 1996 Act, § 601(d) (authorizing the joint marketing of local and interexchange services by a BOC, subject to section 272).

exchange service and in-region interLATA services.[26] The BOCs now seek to exceed that authority by establishing a single, multi-purpose affiliate that would provide both local exchange service and in-region interLATA services. The absence of any sound basis for the establishment of such affiliates by Pacific and Ameritech raises serious concerns regarding their use as vehicles for evading fundamental objectives of the 1996 Act.[27]

First, the statute bars a BOC, and any affiliate of a BOC, from providing in-region interLATA services unless the BOC has satisfied the requirements of section 271.[28] A BOC affiliate that furnishes interLATA services to end users within its region is engaged in providing in-region interLATA services, regardless of whether those services are provided via resale or over its own facilities.[29] Accordingly, the Commission should make clear in this proceeding that neither a BOC nor its affiliate may provide in-region interLATA service in any manner -- including through resale of another interexchange carrier's service -- until the requirements of section 271 are met.

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[26] See 47 U.S.C. § 271(d)(3)(B) (barring Commission approval of a BOC's application to provide in-region interLATA services if the requested authorization will not be carried out "in accordance with the requirements of Section 272).

[27] The Commission itself has recognized the potential for evasion of statutory requirements by BOCs through the transfer of local exchange service capabilities or activities. See Notice at ¶¶ 70, 79.

[28] See 47 U.S.C. § 271(a)(1).

[29] In the MFJ context, the interLATA services restriction barred the BOCs from providing interexchange services via resale or using their own facilities. See e.g. Generic Wireless Relief Order at 18 (granting request for modification of MFJ's interexchange services restriction to permit BOC cellular affiliates to provide cellular interLATA services to their customers via resale).

Second, the provision by a BOC affiliate of local and in-region interLATA services -- whether via resale, over facilities, or through some combination of both -- through the same entity directly contravenes the structural separation between local and long distance service required by the 1996 Act. Section 272 contemplates an arms-length relationship between a BOC's local exchange operations and the provision of interLATA service within its region.[30/] As the Notice correctly recognizes, the structural separations requirements help prevent both improper cross-subsidization of the BOCs competitive services by its captive ratepayers and unfair discrimination against competitors.[31/] Separation also deters the BOCs from leveraging their market power to thwart new entrants during the period of transition to local telephone competition. Because the combined provision by a BOC affiliate of local and long distance service within its region thwarts the framework erected by Congress, it must therefore be precluded by the Commission.

Third, condoning BOC provision of in-region local service though an affiliate will sow confusion in the marketplace. Congress sought to encourage a choice between ILECs and competing unaffiliated providers of local exchange service. If successful, the current BOC efforts to establish new affiliates that will provide local exchange, long distance and other services would give them a headstart in the evolving competitive marketplace and could enable

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[30/] See 47 U.S.C. § 272(a). Section 272 was based upon the Senate-passed version of the 1996 Act. The Senate report language accompanying this provision noted specifically that interLATA telecommunications services "must be separated from the entity providing telephone exchange service." S. Rep. No. 23, 104 Cong. 1st Sess. 22-23 (1995) (emphasis added).

[31/] See Notice at ¶¶ 12-13.

them to capture customers inclined to switch carriers before real alternative providers actually begin to offer service.

Fourth, the structure of the 1996 Act's local competition provisions are predicated upon a distinction between competing local exchange carriers ("CLECs") and incumbent local exchange carriers ("ILECs"). If a BOC affiliate providing local exchange service, whether resold from its parent or using its own facilities, can claim CLEC status by virtue of the fact that it was created after the date of enactment, the intent of the Act could be thwarted by providing a vehicle for a BOC to avoid its obligations and requirements under Section 251(c). Moreover, a single BOC affiliate providing both local exchange service and long distance service or other telecommunications services might be able to engage in below-cost pricing with less fear of detection by regulators, particularly if it is improperly classified as non-dominant or treated as a CLEC. For example, by bundling several services into one combined offering, a BOC affiliate providing resold local service could hide the fact that the local exchange component of its bundled offering is priced at or below the resale discount obtained from its parent; any "losses" would simply be covered by the BOC through charges imposed on customers of its monopoly services, including interconnection, transport, and termination.[32/]

In short, the affiliates providing both local and in-region interLATA services proposed by Ameritech and Pacific Bell threaten to undermine the core purposes of the 1996 Act, and

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[32/] In addition, the marketing and brand-name advantage accruing to the BOC reseller by virtue of its affiliation with its parent could provide it with sizable market share within a relatively short timeframe, enabling it to obtain volume discounts off the conventional resale rate that would be unavailable to unaffiliated competitors.

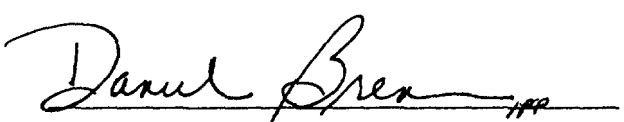
therefore must be rejected.[33/] The BOCs should not be permitted to use newly-minted local exchange affiliates to circumvent statutory duties imposed upon them by the Act.

CONCLUSION

For the foregoing reasons, the Commission can and should impose safeguards on the joint marketing of video and telephone services by the BOCs. To prevent evasions of the core requirements of the 1996 Act, the Commission should also clarify that a BOC may not create a resale affiliate to offer local exchange and other services.

Respectfully submitted,

THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.



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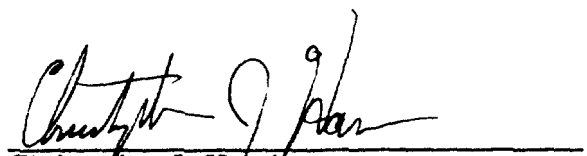
[33/] See e.g. Bob Jones University v. United States, 461 U.S. 574, 586 (1983) (Statutory language cannot be interpreted in manner that "would defeat the plain purpose of the statute"); United States v. American Trucking Associations, 310 U.S. 534, 543 (1940) (where plain meaning interpretation yields unreasonable result "plainly at variance with the policy of the legislation as a whole, this Court has followed that purpose, rather than the literal words"); Albertson's Inc. v. C.I.R., 42 F.3d 537, 545 (9th Cir. 1994) (rejecting construction "of a statutory provision that directly undercuts the clear purpose of the statute").

CERTIFICATE OF SERVICE

I, Christopher J. Harvie, hereby certify that a copy of the foregoing Comments of The National Cable Television Association, Inc. was sent by either first-class mail, postage prepaid, or by hand delivery to each of the following:



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